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Attorneys for Defendants
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Fenner & Smith Incorporated, Jefferies & Company, Inc.,
Cowen & Company, LLC and ThinkPanmure, LLC, formerly
known as ThinkEquity Partners LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re BIGBAND NETWORKS, INC.
SECURITIES LITIGATION

Master File No. 07-cv-5101-SBA

CLASS ACTION

This Document Relates To:

ALL ACTIONS.

**[PROPOSED] ORDER GRANTING
UNDERWRITER DEFENDANTS'
MOTION TO DISMISS PLAINTIFFS'
CONSOLIDATED COMPLAINT**

Date: December 9, 2008
Time: 1:00 p.m.
Judge: Hon. Saundra B. Armstrong
Ctmm: 3, 3rd Floor

1 Defendants Morgan Stanley & Co. Incorporated, Merrill Lynch, Pierce, Fenner & Smith
2 Incorporated, Jefferies & Company, Inc., Cowen & Company, LLC and ThinkPanmure, LLC
3 (formerly known as ThinkEquity Partners LLC) (collectively, the “Underwriter Defendants”)
4 brought a Motion to Dismiss Plaintiffs’ Consolidated Class Action Complaint for Violation of
5 Securities Laws (the “Complaint”) before this Court. After considering the pleadings, the papers
6 submitted by the parties, and the oral argument of counsel, and good cause appearing therefore, the
7 Court hereby orders that the Underwriter Defendants’ Motion to Dismiss is granted.

8 Specifically, the Court grants the Underwriter Defendants’ Motion to Dismiss in its entirety
9 for failure to state a claim pursuant to Rules 8, 9(b) and 12(b)(6) of the Federal Rules of Civil
10 Procedure. Plaintiffs’ Complaint fails to plead facts sufficient to establish that the Prospectus
11 contained statements that were either materially false, or rendered materially misleading by virtue
12 of an omission. 15 U.S.C. §§ 77k(a) & 77l(a)(2). The Court finds that plaintiffs’ allegations sound
13 in fraud and fail to satisfy the heightened requirements of Rule 9(b). *See, e.g., In re Stac Elecs.*
14 *Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996). Irrespective of the application of Rule 9(b), the
15 Complaint is also deficient under Rule 8 and the Supreme Court’s decision in *Bell Atlantic Corp. v.*
16 *Twombly*, 127 S. Ct. 1955 (2007) and its progeny. *See, e.g., Belodoff v. Netlist, Inc.*, 2008 WL
17 2356699, at *12 (C.D. Cal. May 30, 2008). All claims based on forward-looking statements are
18 nonactionable under the “bespeak caution” doctrine and fail for the additional reason that the
19 Prospectus cautioned investors against the very risks that form the basis of plaintiffs’ allegations.
20 *See, e.g., In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1414 (9th Cir. 1994). Finally,
21 plaintiffs’ Section 12 claim fails as a matter of law because the Complaint fails to plead facts that
22 would confer standing on the Lead Plaintiff, and his certification filed pursuant to the Private
23 Securities Litigation Reform Act of 1995 conclusively demonstrates the absence of standing under
24 Section 12. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 577-78 (1995); *In re Levi Strauss &*
25 *Co. Sec. Litig.*, 527 F. Supp. 2d 965, 983 (N.D. Cal. 2007).

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1 Accordingly, it is hereby ordered that the Underwriter Defendants' Motion to Dismiss is
2 GRANTED, and Plaintiffs' Complaint against the Underwriter Defendants is dismissed in its
3 entirety WITH PREJUDICE.

4 **IT IS SO ORDERED.**

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6 Dated: _____

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HONORABLE SAUNDRA B. ARMSTRONG
9 UNITED STATES DISTRICT COURT JUDGE
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